Filed 10/26/16 P. v. Alcala CA4/3
Received for posting 10/28/16

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JESUS VARGAS ALCALA, Defendant and Appellant.	G050972 (Super. Ct. No. 13NF0929) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Dan McNerney, Judge. Affirmed.

Nancy J. King, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Michael Pulos, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted Jesus Vargas Alcala of sexual offenses against his two nieces when they were each under 14 years old, including aggravated sexual assault by oral copulation (Pen. Code, §§ 269, subd. (a)(4)); all further statutory references in this paragraph are to this code), aggravated sexual assault by penetration with a foreign object (§§ 269, subd. (a)(5)); two additional lewd and lascivious acts (§ 288, subd. (a)) involving the same victim as the foregoing acts; and two lewd and lascivious acts (*ibid.*) involving the other niece. The jury also found true an enhancement allegation based on multiple sexual assault victims. (§ 1203.066, subd. (a)(7).) The trial court sentenced defendant to a 30-years-to life term comprised of consecutive 15-years-to-life terms on the first two counts, and concurrent terms on the remaining counts. Defendant challenges the admission of testimony by the girls' mother and brother alleging other uncharged acts of prior sexual abuse. He also contends the trial court should not have instructed the jury on adoptive admissions based on a pretext call with one of the victims, and he argues the final two counts were precluded by the applicable statute of limitations. As we explain, these contentions lack merit, and we therefore affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

I.M. and her brother, B.M. used to spend time with defendant, who was their mother's half brother, when they were six and seven years old, respectively. Defendant would pick them up in his car and drive them to his house to spend the night, but I.M. did not like to sit in the front seat because he would touch her legs and upper thigh near her vagina. They all slept in the same bed and, although I.M. wore her pajamas, she would wake to defendant touching and orally copulating her vagina. He also inserted his fingers in her vagina, and when she tried to push him away or move away, he would pull her closer and hold her down with one hand while using the other to penetrate her. Defendant instructed her not to tell anyone, and continued abusing her for several years.

A decade later, when I.M. was 16 years old, defendant told her mother, I.V., that he wanted to spend time with her daughter. I.V. rejected defendant's request. Upon learning of defendant's request, I.M. became extremely nervous, she began to shake, and she had trouble breathing. I.V. told I.M. that defendant had "bothered" her (I.V.) years before in Mexico. I.M. did not disclose the abuse immediately, but instead became depressed and lost her appetite or will to do anything. She eventually told her mother and older sister, R.M., what defendant had done to her, and reported the abuse to the police.

The police had I.M. make a "pretext call" to defendant to attempt to have him admit the abuse. During the call, defendant claimed he did not remember abusing I.M., but he made equivocal statements, including repeatedly asking her forgiveness. A recording of the call was played at trial, and a translated transcript of the call was provided to the jury.

R.M. then reported to the police that defendant also sexually abused her when she was around six years old, when she and I.V. lived with defendant. Defendant would lure her with offers of candy to join him in his car, where on five or six occasions he touched her on her vagina, both over and under her clothes. He used his fingers to rub her vagina from front to back. R.M. did not tell her mother because she was afraid defendant would kick them out of his home.

I.V. testified at trial, corroborating that her daughters I.M. and R.M. spent time alone with defendant. She also testified that when she was 12 years old and living in Mexico, and defendant was 20 or 21 years old, he would touch her breasts and vagina and expose himself to her on visits to her home. He put his hands under her clothes, touched her skin on her vagina, and inserted his fingers into her vagina, which was painful. He directed I.V. not to tell anyone. When I.V. later had a family of her own and moved to California, she believed defendant had changed because he spoke a great deal about

religion and even installed a chapel in his home where he prayed with his mother. I.V. did not believe defendant would molest her children.

I.V.'s son, B.M., testified and corroborated that defendant would pick him and I.M. up in his car, that neither wanted to sit in the front seat with him, and he explained that while he and I.M. would begin the night sleeping on the floor, defendant would pick up I.M. and move her to his bed. B.M. also disclosed for the first time at trial that defendant sometimes also picked him up to move him to defendant's bed and at least once grabbed his penis. Defendant would also tickle him and touch B.M.'s private parts while they were in defendant's car. B.M. had never told anyone about the abuse, including his own family or the detectives who had interviewed him.

II

DISCUSSION

A. Uncharged Sex Offenses

Defendant contends the trial court erred by admitting under Evidence Code section 1108 (all further statutory citations are to this code) I.V.'s and B.M.'s testimony concerning defendant's uncharged sexual misconduct against them. Section 1108 provides for the admission of propensity evidence in sex offense cases, where it is more probative than prejudicial in determining the defendant's guilt on the charged offenses. (§ 1108, subd. (a); *People v. Soto* (1998) 64 Cal.App.4th 966, 991 (*Soto*) [probative evidence of other sexual crimes was "exactly the type of evidence contemplated by the enactment of section 1108"].) The evidence must pass muster under section 352.

Under section 352, the trial court "in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Evidence is substantially more prejudicial than probative if it poses an intolerable risk to the fairness of the proceedings or the reliability of the outcome. (*People v. Waidla* (2000) 22 Cal.4th 690,

724.) Factors relevant to the court's decision whether to admit evidence of other sex acts include: (1) the probative value of the alleged acts, (2) whether they are more or less inflammatory compared to the present offense, (3) the probability the evidence will confuse the jury, (4) whether undue time will be consumed in admitting the evidence, and (5) the remoteness in time of the prior acts. (*People v. Harris* (1998) 60 Cal.App.4th 727, 738-740 (*Harris*).)

Courts have upheld the constitutionality of section 1108 based on the essential safeguard section 352 provides against a fundamentally unfair trial. (See, e.g., *People v. Falsetta* (1999) 21 Cal.4th 903, 922.) An erroneous ruling under section 352 therefore could have constitutional implications, as defendant claims here. We review the court's ruling under section 352 for abuse of discretion (*People v. Branch* (2001) 91 Cal.App.4th 274, 282 (*Branch*)), and find none.

1. I.V.

Defendant argues the alleged acts involving his half sister I.V. were too remote to be probative. Incidents as long as 30 years before the charged offense have been admitted under section 1108. (*Branch, supra*, 91 Cal.App.4th at pp. 284-285 [evidence admitted despite "30-year gap" between prior act and charged offense]; *People v. Waples* (2000) 79 Cal.App.4th 1389, 1395 [20 years]; *Soto, supra*, 64 Cal.App.4th at pp. 977-978, 991-992 [admitting evidence of 20- to 30-year old acts].) According to defendant, the relevant period here is more than 30 years, measured from the date of trial back to his actions in 1978 involving I.V.

But as the trial court explained, "The issue is the period of time between the [section] 1108 event and the charged offense. And so I don't look at this remoteness issue in terms of 36 years between 1978 when this allegedly occurred with [I.V.] until the date of trial. I look at the period of time between the incident — alleged incident against [I.V.] in 1978 and the time of the 1993 conduct that is the subject matters of counts . . .

5 and 6 [involving R.M.], which is a 15-year period. And similarly, with respect to the 1978 alleged incident and the 2002 events that are charged in counts 1 through 4 [involving I.M.], which is a 24-year period."

The trial court reasonably could conclude the probative value of the recurring, similar nature of defendant's conduct outweighed the remoteness of his behavior toward I.V. The "staleness" of an offense is generally relevant only when the defendant has led a legally blameless life in the interim. (*Harris*, *supra*, 60 Cal.App.4th at p. 739.) In contrast, repeated offenses increase the probity and relevance of such offenses in gauging similar conduct. (*People v. Escudero* (2010) 183 Cal.App.4th 302, 305-306 [noting Legislature's rationale for section 1108 based on findings "that persons who commit sex offenses often have a propensity to commit sex crimes against more than one victim"].)

As the trial court observed: "[W]hat is significant is it is sexual behavior that is addressed at three females within the defendant's close family circle. His half sister and the daughters of that same half sister. I think that — I'm reluctant to call it a pattern, but certainly the progression of alleged sexual misconduct directed first at the sister and then — first at the defendant's sister then 15 years later at his niece and then another nine years later at his other niece, both children of the sister, does make the [section] 1108 evidence involving the mother, I think, much more probative."

Under the *Harris* factors, the trial court did not err in declining to exclude I.V.'s testimony: its probative value was high in demonstrating defendant's similar conduct with female relatives of the same age; none of the conduct was particularly more inflammatory with one relative than others, but rather was similar in nature; the evidence was unlikely to confuse the jury because its relevance was clear; and defendant does not suggest any undue time was wasted in admitting the evidence. (*Harris*, *supra*, 60 Cal.App.4th at pp. 738-740.) In sum, as the court phrased it, defendant's willingness to engage in sexual misconduct when each of his related victims were "about this age"

put "the remoteness issue . . . in a much different light." Consequently, the court did not err in declining to exclude I.V.'s testimony.

2. B.M.

Defendant argues he received ineffective assistance of counsel (IAC) when his trial attorney failed to object to B.M.'s surprise trial testimony that defendant abused him. The prosecutor recognized below that section 1108, subdivision (b), requires disclosure of such evidence, "including statements of witnesses or a summary of the substance of any testimony that is expected to be offered," at least 30 days before the trial, but neither the prosecutor nor the detectives knew of B.M.'s allegation. In fact, B.M. specifically denied defendant abused him when the detectives interviewed him. (See *People v. DePriest* (2007) 42 Cal.4th 1, 37-38 [disclosure of evidence the morning after its discovery was timely].) Defense counsel did not object to B.M.'s testimony when he offered it, nor later when the parties and the court discussed whether to include it in the court's instruction on propensity evidence.[1]

---

[1] Consistent with CALCRIM No. 1191, the trial court instructed the jury on propensity evidence as follows: "The People presented evidence that the defendant committed a crime of touching [I.V.'s] vagina and breasts in Mexico and B[.]M's penis in the car and in the bed in Anaheim, which are lewd acts on children under the age of 14 which were not charged in this case. These crimes are defined elsewhere for you in these instructions. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence the defendant, in fact, committed the uncharged offenses as to [I.V.] and B[.]M. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not the fact is true. [¶] If the People have not met this burden of proof, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the uncharged offenses, you may, but are not required to, [conclude] from the evidence the defendant was disposed or inclined to commit sexual offenses, and based on that decision also conclude the defendant was likely to commit and did commit aggravated sexual assault and lewd acts on a child under 14 as charged in this case. If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove the defendant is guilty of aggravated sexual assault and lewd acts on a child under 14. The People must still prove each charge beyond a reasonable doubt."

Defendant now asserts, "The obvious answer to the judge's question [about what to do with B.M.'s testimony] would have been for defense counsel to seek a mistrial because of the damaging and inflamm[atory] evidence that was unexpectedly presented." Alternatively, defendant suggests the court should have instructed the jury to ignore the evidence. Absent an objection to the evidence or request for a mistrial, defendant contends reversal is required based on ineffective assistance of counsel. (See *People v. Ledesma* (1987) 43 Cal.3d 171, 215 [right to counsel under federal and state Constitutions "'entitles the defendant not to some bare assistance but rather to *effective* assistance'"]; accord, *Strickland v. Washington* (1984) 466 U.S. 668, 686 (*Strickland*).)

To establish an IAC claim, a defendant must show counsel's representation failed to meet an objective standard of professional reasonableness, thereby prejudicing the defendant because absent counsel's failings, there is a reasonable probability the defendant would have gained a more favorable trial result. (*Strickland*, *supra*, 466 U.S. at pp. 687-688.) An appellate court must defer to counsel's tactical decisions because there is a """strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."""" (*People v. Weaver* (2001) 26 Cal.4th 876, 925 (*Weaver*).) "An attorney may choose not to object for many reasons, and the failure to object rarely establishes ineffectiveness of counsel." (*People v. Kelly* (1992) 1 Cal.4th 495, 540; see *People v. Riel* (2000) 22 Cal.4th 1153, 1197 (*Riel*) ["'choice of when to object is inherently a matter of trial tactics not ordinarily reviewable on appeal'"].)

Consequently, the Supreme Court has stressed that appellate IAC claims must be rejected """unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation."""" (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) "In the usual case, where counsel's trial tactics or strategic reasons for challenged decisions do not appear [expressly] on the record, we will not find [IAC] on appeal unless there could be no conceivable reason for counsel's acts

or omissions. [Citations.]" (*Weaver*, *supra*, 26 Cal.4th at p. 926.) That is not the case here.

We find no merit in defendant's IAC claim on appeal for the simple reason that "we cannot eliminate the probability that defense counsel had valid tactical reasons for not objecting." (*People v. Jones* (2009) 178 Cal.App.4th 853, 860.) Defense counsel may have believed B.M.'s surprise testimony was tactically useful to discredit B.M.'s entire family for conspiring to invent abuse claims against him. Indeed, counsel dwelled on that theory in closing argument. As respondent acknowledges, B.M.'s "testimony was particularly susceptible to this argument because he claimed he had never told anyone about this before taking the witness stand . . . . To believe [B.M.], one had to believe that he lied to [the] detectives but was telling the truth at trial." Consequently, defendant's IAC claim provides for no basis for reversal on appeal.

B. *Adoptive Admissions*

Defendant argues the trial court erred by instructing the jury to consider whether any of his statements in his telephone conversation with I.M. qualified as an adoptive admission. Defendant contends the instruction was unwarranted because nothing in the conversation met the standard for an adoptive admission. Defendant focuses on what he contends were his uniform "express denials of *any recollection* of abusive conduct" (italics added), while ignoring his failure to deny the abuse occurred and inculpatory statements he made, including requests for forgiveness.

Section 1221 provides, "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth."

A statement is admissible as an adoptive admission if the evidence shows the defendant heard and understood the statement and that it would call for a denial if

false, but by words or conduct the defendant adopted the statement as true. (*People v. Davis* (2005) 36 Cal.4th 510, 535.) The statement need not be a direct accusation; a statement that would normally call for a response if it were untrue suffices. (*Riel, supra*, 22 Cal.4th at p. 1189.) Evasive or equivocal replies, as well as silence, may constitute adoptive admissions. (*Ibid*.)

Here, I.M. in her phone conversation with defendant repeatedly accused him of abusing her (e.g., "You abused me") by touching her, including when "[y]ou used to take my clothes off." She asked him, "Why did you do that to me when I was little?"

She made clear she knew he abused R.M. ("I know you tried to do that to my—my sister") and "also my mom." Defendant immediately claimed, "[B]elieve me that I don't remember," but then vacillated between denying any recollection of the abuse and equivocal statements like "during that time, [I] was a young person, a person that didn't know what he was doing," "if I did it, forgive me" because now "I am another person[,] I believe in God[,]" "I am regretful of everything I have done in my life[,] Believe me," and "I ask you for a thousand pardons." While he stated, "I don't remember abusing [you]," he attempted to cast any abuse as "[m]aybe— in my dream . . . ." He stated, "I'm not that person anymore" and "I want to forget all of the past." He pleaded, "Forgive me. Forgive me. I was in those drunkenness [*sic*] . . . in that junk that didn't leave anything good, just a disease for life and I'm taking medicine for that." He counseled her that forgiveness would help her forget "the things," and concluded the call with another plea, "Forgive me, . . . okay?"

Whether a defendant's silence or statements actually constituted an adoptive admission is a question for the jury to decide. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1011.) This distinction is critical because defendant does not assert the recording of the conversation should not have been admitted, nor a transcript provided to the jury. Indeed, defendant favored the admission of the recording precisely because he made no express admission of abuse, and therefore the jury "in listening to the tape may

have been able to gain some [insight] about [his] or [I.M.]'s credibility . . . . Instead, defendant contends the court erred in instructing the jury on adoptive admissions for lack of foundation. As defendant phrases it, the jury "should not have been instructed that it could consider [his] statements as the equivalent of an admission — it was no such thing."

But the answer to this contention is found in the instruction itself. It specifically does not state or assume there was an admission. To the contrary, the instruction leaves this question for the jury to evaluate. After listing the requirements for an adoptive admission, the instruction specifies: "*If you* decide that all of these requirements have been met, you *may* conclude that the defendant admitted the statement was true."[2] (Italics and underlining added.)

Thus, whether the requirements for an adoptive admission exist is for the jury to determine. It falls within the trial court's sound discretion to instruct the jury on adoptive admissions. (*People v. Carter* (2003) 30 Cal.4th 1166, 1198.) Because it was for the jury to assess I.M.'s and defendant's credibility, the court did not err in providing the instruction. While defendant hoped the jury would find his denials of any recollection credible, it was within the jury's purview to find him not credible. In essence, defendant argues the court should not have given the instruction because a reasonable jury could *only* credit his denial of any recollection of the alleged events. But

---

[2] In full, the court instructed the jury with CALCRIM No. 357, as follows: "If you conclude someone made a statement outside of court that accused the defendant of a crime and the defendant did not deny it, you must decide whether each of the following are true: [¶] 1. The statement was made to the defendant or made in his presence; [¶] 2. The defendant heard and understood the statement; [¶] 3. The defendant would, under all circumstances, naturally have denied the statement if he thought it was not true. [¶] AND [¶] 4. The defendant could have denied it, but did not. [¶] If you decide that all of these requirements have been met, you may conclude that the defendant admitted the statement was true. [¶] If you decide that all of these requirements have not been met, you must not consider either the statement or the defendant's response for any purpose."

particularly in light of his equivocal statements, including begging for forgiveness, the court properly gave the instruction. Simply put, a reasonable jury could conclude he did not deny I.M.'s accusation precisely because it was true, and instead took refuge in false denials of failing to remember the abuse. Defendant's claim is without merit.

C. *Statute of Limitations*

Defendant asserts his convictions on count 5 and 6 must be reversed because they were filed beyond the statute of limitations. We disagree. The allegations involving R.M. occurred between October 2, 1993, and October 2, 1995, when the statute of limitations for these offenses was six years. (Pen. Code, § 288, subd. (a); former Pen. Code§ 800; Stats. 1984, ch. 1270, § 2, p. 4335.) Using the earliest date of alleged conduct, the limitations period would have run by October 2, 1999. In January 1994, however, Penal Code section 803, subdivision (g), now codified in subdivision (f), was enacted, extending the time in which to file sex abuse charges. While new statutes cannot revive expired statutes of limitations, they can extend a limitations period that has not expired. (*Stogner v. California* (2003) 539 U.S. 607, 632-633.)

Under Penal Code section 803, subdivision (f)(1), "[n]otwithstanding any other limitation of time described in this chapter, a criminal complaint may be filed within one year of the date of a report to a California law enforcement agency by a person of any age alleging that he or she, while under 18 years of age, was the victim of a crime described in," among other code sections, Penal Code section 288.

By its terms, the new limitations period "applies only if all of the following occur: (A) The limitation period specified in Section 800, 801, or 801.1, whichever is later, has expired[;] (B) The crime involved substantial sexual conduct, as described in subdivision (b) of Section 1203.066, excluding masturbation that is not mutual[;] (C) There is independent evidence that corroborates the victim's allegation. If the victim was 21 years of age or older at the time of the report, the independent evidence shall

clearly and convincingly corroborate the victim's allegation." (Pen. Code, § 803, subd. (f)(2).)

These requirements are met here. First, R.M. disclosed defendant's sexual abuse to law enforcement in February 2013, and the amended complaint based in part on that conduct was filed less than a year later in June 2013. Second, the former six-year limitations period under Penal Code section 800 had expired.

Third, the crime involved "substantial sexual conduct," namely masturbation of the victim rather than himself. As the court in *People v. Lamb* (1999) 76 Cal.App.4th 664, 682, explained, a defendant's "acts in masturbating the victim fall within the definition of mutual masturbation set forth in section 803, subdivision (g), and thus qualify for the extended statute of limitations described in that section." Here, the evidence shows defendant touched and rubbed R.M.'s vagina with his fingers, both directly and over her clothes, and therefore the jury's verdict established the substantial sexual conduct necessary for the extended limitations period.

Fourth, independent evidence corroborated R.M.'s allegations. I.V. testified R.M. went out alone in defendant's car with him, corroborating her claim defendant abused her there. More importantly, the independent evidence involving I.V.'s and I.M.'s corresponding allegations that defendant also molested them when they were around the same age as R.M. provided clear and convincing evidence corroborating R.M.'s allegations. Accordingly, the counts involving R.M. were timely filed within the extended limitations period.

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

MOORE, ACTING P. J.

FYBEL, J.